

OPINION
47-150

September 5, 1947 (OPINION)

INTOXICATING LIQUOR

RE: City - Territorial Jurisdiction Over Liquor Traffic

This will acknowledge your letter of August 29, in which you raise the question of the territorial jurisdiction of the City of Napoleon under and by virtue of sections 40-0601 and 40-2005 of the Revised Code of 1943, particularly as applied to ordinances dealing with regulation of the liquor traffic. Section 40-0601 of the North Dakota Revised Code of 1943, in so far as the same is pertinent reads as follows:

"Except as otherwise provided by law a governing body of a municipality shall have jurisdiction:

1. (Not applicable to your inquiry).
2. In and over all places within one-half mile of the municipal limits for the purpose of enforcing health and quarantine ordinances and regulations and policy regulations and ordinances adopted to promote the peace, order, safety, and general welfare of the municipality."

Section 40-2005 reads as follows:

"The chief of police shall perform such duties as shall be prescribed by the governing body for the preservation of the peace. Within the city limits, and for a distance of one and one-half miles in all directions outside the city limits, the police officers and watchmen of the city shall perform the duties and exercise the powers of peace officers as defined and prescribed by the laws of this state. * * * * In addition to the duties set out in this section, the police shall perform such other duties as may be prescribed by ordinance or statute."

Before your specific questions are discussed, some general consideration of the law with reference to the territorial jurisdiction of a city under its ordinance is necessary.

"Municipal ordinances are necessarily local in their application. Usually they operate only in the territory of the municipality by which they are enacted and can have no force beyond it. Of course, it is competent for the legislature to confer power to pass ordinances operative beyond the corporate boundaries. This may be done for the purpose of suppressing or preventing nuisances, which affect the inhabitants of the corporation."

McQuillan Municipal Corporations, 2nd Edition, Vol. 2, Section 693, page 587.

"The general rule is that the police powers of a municipal corporation can be exercised only within its own area and without special authorization, cannot be exercised outside of the municipal boundaries. The right to exercise police power beyond the municipal area must be derived by legislative grants which expressly or impliedly permits it."

McQuillan Municipal Corporations 2nd Edition, Vol. 3, Section 952, page 113. See Note 94.

We find that it has been held that state penal offenses as misdemeanors against the city or town must be limited to municipal areas. Oxford vs. Buford, 134 Miss. 635, 99 So. 498.

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It was also held in the case of Brown vs. City of Cle Elum, 145 Wah. 588, 255 P. 961, 261 P. 112, 55 ALT 1175, that a general ordinance to protect its water supply beyond its area was unconstitutional and that an ordinance, although authorized by legislative grant cannot penalize persons who shall commit certain acts on property situated six miles beyond the corporate limits of the city under a constitution restricting the exercise of such power within the municipal area.

It might be argued that under section 40-0601 the enforcement of ordinances within one-half mile of the municipal limits has been granted, and that this statute amounts to the delegation of power to pass ordinances that might be operative to within one-half mile of the actual municipal limits. But it must be remembered that the governing body has such jurisdiction only, except as otherwise provided by law. These statutes have reference to the police power, "except as otherwise provided by law".

In view of the fact that the liquor traffic outside of corporate limits is regulated by state law or by the county commissioners under authority granted to them, the question arises whether city ordinances regulating the liquor traffic can have any effect except within the corporate limits. Section 5-0208 of the 1943 Revised Code gives the board of county commissioners of each county the same powers relating to the retailing of beer or ale in the territory in which county outside of incorporated cities and villages as are granted to the governing boards of incorporated cities and villages in section 5-0207. Section 5-0320 of the 1943 Revised Code gives the county the right to revoke licenses for cause and regulate the retail sale of liquor within its jurisdiction, subject to review by the courts. Accordingly, it appears that our law has provided regulatory power in the county commissioners of both beer and liquor in territory outside of cities and villages.

Chapter 49 of the 1945 Session Laws generally deals with the closing hours of all licensed beer and liquor dealers and while both cities and villages and the counties could undoubtedly set an earlier closing hour than provided by this chapter, they could not extend the closing hour beyond one o'clock a.m. on week nights and twelve o'clock midnight on Saturday.

If a city had the authority by ordinance to regulate the liquor traffic outside of its corporate limits, but within the limits mentioned in sections 40-0601 and 40-2005 the liquor dealers within such area would be subject to the state law, the city ordinances, and the ordinances, resolutions and regulations enacted by the county commissioners pursuant to statute. Such a situation is, I believe, contrary to the legislative intent as expressed by the statutes authorizing regulation of retail liquor dealers by the county commissioners in unincorporated areas, and giving them the local licensing power. Such statutes indicate that they were in effect authorizing in unincorporated areas the same regulatory authority as was granted to the governing bodies of cities and villages. If the law were interpreted otherwise, liquor places between the corporate limits of any city or village and the limits mentioned in the two statutes above referred to, would be subject to three sets of regulations which would undoubtedly lead to confusion. It is even conceivable that in such a case liquor dealers within the area might, if equally distant from two neighboring towns, be subject to the ordinances of both such municipalities.

The intent of the statutes seems to be that each retail liquor dealer be subject to two types of control, the local control of the cities and villages by ordinances and the state law if located within a city or village, and if located in unincorporated area to the control of the county commissioners and the state law.

In view of the fact there seems to be no basis for the implication that the violations of the city ordinance so drawn as to give the city authority to the extent of the corporate limits and as far beyond as authorized by statutes, be imposed outside of the actual corporate limits of the city or village.

"As a general rule a municipal corporation's powers cease at municipal boundaries and cannot, without plain manifestation of legislative intention, be exercised beyond its limits, even though it may have acquired property outside of its geographical limits." 43 C.J. 235, Para. 233.

It appears that the regulation of the liquor traffic and the licensing thereof under the state law by the counties in unincorporated territory evidences a plain manifestation intention that the city ordinances insofar as their regulatory powers of the sale of intoxicating liquor as are vested in cities and villages, operate only within the actual corporate limits of the city.

An ordinance of a municipal corporation prohibiting the sale of intoxicating liquor within a half mile of the corporate limits and further providing that any person violating the provisions of the ordinance should, on conviction in the police court in the city, be fined, etc., and making it the duty of the police to enforce the ordinance, and to arrest all persons violating the same, and to take them before the police judge of such city to be dealt with according to the ordinance, was void, as in conflict with the constitutional provision of the state of Kentucky authorizing the establishment of a police court in each city or town with jurisdiction over violations of municipalities within the corporate limits of the city or town within which it is established. Earle vs. Latonia Agricultural

Association, 106 SW 312, 127 Ky. 578, 32 Ky. Law Rep. 469, 586. See also State vs. Stiles, 25 So. 1015, 121 Ala. 363.

It has been held that, "Statutes authorizing the exercise of municipal powers beyond the municipal boundaries are strictly construed." Day vs. Lansdale Borough, 28 Pa. Dist. 330. Since such statutes are to be strictly construed and since the municipality has jurisdiction only under the terms of Section 40-0601 except as otherwise provided by law it appearing that our Legislature has provided for the regulation of the liquor traffic in unincorporated territory, there would be little, if any basis, for contending that the authorization of either this section or section 40-2005 would allow the imposition of the ordinances and their penalty provisions upon liquor places existing outside of the actual corporate limits but within one-half or one and one-half mile thereof.

Section 12-0104 (13) states: "'Peace officer' signifies any sheriff, coroner, constable, policeman, or marshal and any other officer of officers whose duty it is to enforce and preserve the public peace."

Section 29-0510 defines a police officer as follows:

"A peace officer is a sheriff of a county or his deputy, or a coroner, constable, marshal, or policeman of a township, city or village."

Under section 5-0115, of the North Dakota Revised Code of 1943, it is the duty of every sheriff, deputy sheriff, constable, mayor, marshal, police judge, and police officer of any city or village having notice or knowledge of any violation of the provisions of this title, to notify the state's attorney of the fact of such violation and to furnish him the names of any witness within his knowledge by whom such violation may be proven. If any officer shall fail to comply with the provisions of this section, he, upon conviction, shall be fined not less than \$100 nor more than \$500 and such conviction shall work a forfeiture of the office held by such person. It may also constitute a basis for his removal by civil action.

Under section 5 0209, of the 1943 Revised Code, it is the duty of the State's Attorney, the sheriff, his deputies, and all police officers to enforce rigidly the provisions of the beer law in territory outside of incorporated cities and village. In addition to these statutes, chapter 50, of the 1945 Session Laws, section 12 provides, that all peace officers of the state of North Dakota shall be charged with the duty of enforcing the provisions of that chapter and all other provisions of law relating to the manufacture, sale of beer, alcohol and alcoholic beverages, and their failure to perform their duties shall be grounds for their removal. Thus it will be seen that police officers of every city and village are bound under the provisions of the various statutes to enforce the liquor laws, not only within the corporate limits of a city, but in territory outside the corporate limits of such city.

While the ordinances of a city cannot in view of the regulatory law provided by statute and power of regulation granted to the county commissioners in territory outside of incorporated cities and villages, be imposed upon dealers in unincorporated territory, the

police officers of any city or village are bound to enforce the state law in all such establishments.

Now in view of the considerations hereinbefore mentioned, I shall endeavor to specifically answer your questions.

You ask,

"1. What authority has the city of Napoleon in regards to this liquor store (having reference to the store you mention)? (Or, its Police Department?)" The city under the ordinances has not authority over this liquor store. However, it is the duty of the city police if they see anything wrong going on there to exercise their authority as peace officers and enforce the law regulating the same.

"2. Should minors be found in this establishment, can the Napoleon Police exercise their authority in this establishment as they can with the liquor stores within the city limits?" Yes. As peace officers it is their duty if they find minors in such establishments to enforce the state law. Chapter 50 of the 1945 Session Laws provides that no minors, that is persons under 21 years of age, may be permitted in any liquor establishment.

"3. If the Napoleon ordinances read that all liquor stores within the city limits and within the jurisdiction of the governing body must close by 11:30 p.m., can we close such establishment at such an hour?" In view of what has been said and the general closing hour provided by law and the further fact that the county commissioners may by ordinance or resolution set a closing hour earlier than the closing hour provided by statute, I do not deem that the ordinances of the city of Napoleon would have any extra territorial effect outside of the actual corporate limits of the city. If they did and a definite hour for closing was provided by the county commissioners' ordinance or resolution, there might, of course, be a conflict, and since the county commissioners have the power of regulating such places it seems to me that their regulation would govern rather than the regulation of the city even though such regulation purported to govern the territory outside of the actual corporate limits of the city of Napoleon and within one and one-half miles thereof.

"4. Incidentally, if the question as proposed in item 3 were to read 'within the jurisdiction of the police (section 40-200)' would that make any appreciable difference?" I do not think so. The mere fact that an ordinance attempted to impose regulatory provisions outside of the corporate limits of the city of Napoleon would not be effective in view of the fact that such places are already regulated under the powers of the county commissioners and by general provisions of the state law.

"5. If the Napoleon ordinances omitted entirely its jurisdiction, would the same answers hold as would apply to item 3 and 4?" Yes, even though the ordinances, as already

have been indicated, were to recite that they were effective within the territory specified in both sections 40-0601 and 40-2005 they do not have that effect. If the ordinance can have effect as to liquor places only within its corporate limits, it would be immaterial whether this provision was omitted or not. Mere recital of the provisions of section 40-2005 would not confer jurisdiction in my estimation in view of the regulation imposed by the county commissioners and by the state law.

"6. For certain infractions and violations as may occur in this particular establishment contrary to the city ordinances, could trial be had in police magistrate's court?" I do not believe so. Infraction of the state law by a liquor dealer outside of the corporate limits of the city can be punished under the regulations imposed by the county commissioners and the state law but not otherwise.

I trust that this sufficiently answers your inquiry. However, I cannot urge too strongly that the mere fact that the penalty provisions of a city ordinance may not be effective as to a liquor place outside of an incorporated city does not in any way relieve the police officers, as peace officers of the state, from enforcing effectively and stringently all provisions of law providing for the regulation of the sale and consumption of intoxicating liquor.

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